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HAND BAGGAGE RETAINED IN THE CONTROL OF THE PASSENGER. — The extraordinary liability of a common carrier of goods as an insurer has been said to be a survival of the law as it once was in all cases of bailment.¹ Probably the only cases holding the bailee liable in the absence of negligence rested on his undertaking to carry the goods safe from robbery, and the present insurer's liability is a result of a mistaken extension by Lord Mansfield of those cases.² Whatever the true explanation of the sources of this liability, its basis is a bailment of goods to the carrier as carrier.³ Liability begins only with the delivery of the goods into his possession,⁴ and ends when the possession as carrier ends.⁵ Thus, when the owner accompanies his goods, so that the carrier does not assume the bailee's control, the carrier is not liable as insurer.⁶

For baggage delivered to the carrier for the journey, he is liable as an ordinary carrier of goods.⁷ Lord Holt held in two cases that there was no responsibility, unless a distinct price was paid for the baggage.⁸ But the obligation to transport with the passenger certain personal effects necessary on the journey⁹ has long been recognized¹⁰ and compensation is found in the payment of fare.¹¹ As in the days of the stagecoach the bulkier articles were placed in the boot,¹² so now they are taken in a separate baggage car. But small articles of immediate necessity the passenger has the right to keep with him.¹³

For baggage rightfully retained by the passenger in his sole possession, the rule is well settled that the carrier is responsible only for due care.¹⁴ But the cases are in great conflict where the passenger retains only some degree of control. According to some cases, the carrier has apparently no responsibility at all.¹⁵ Against steamship companies, New York enforces the peculiar innkeeper's liability.¹⁶ Other cases impose the insurer's liability unless the possession by the passenger is exclusive.¹⁷ But unless the possession by the carrier is exclusive, the better view seems to be to hold the carrier responsible only for due care.¹⁸ This test

¹ HOLMES, COMMON LAW, Lecture V.

² *Forward v. Pittard*, 1 T. R. 27. See 11 HARV. L. REV. 158.

³ *The R. E. Lee*, 2 Abb. (U. S.) 49. See *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, 35.

⁴ *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. (U. S.) 386.

⁵ *Ouimit v. Henshaw*, 35 Vt. 605.

⁶ *East India Co. v. Pullen*, 2 Str. 690.

⁷ *Woods v. Devin*, 13 Ill. 746.

⁸ *Middleton v. Fowler*, 1 Salk. 282; *Upshare v. Aidee*, 1 Comyns 24.

⁹ For a good statement of what constitutes proper baggage, see *Woods v. Devin*, *supra*, 750.

¹⁰ *Brooke v. Pickwick*, 4 Bing. 218.

¹¹ See *Chicago & Rock Island R. Co. v. Fahey*, 52 Ill. 81, 83.

¹² See *Brooke v. Pickwick*, *supra*.

¹³ *Runan v. Central R. Co. of New Jersey*, 61 N. J. L. 537, 41 Atl. 367.

¹⁴ *Tower v. Utica & Schenectady R. Co.*, 7 Hill (N. Y.) 47.

¹⁵ *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302.

¹⁶ *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369.

¹⁷ *Louisville, Nashville & Great Southern R. Co. v. Katzenberger*, 16 Lea (Tenn.) 380; *Richards v. The London, Brighton, & South Coast Ry.*, 7 C. B. 839; *Le Conteur v. London & South Western Ry. Co.*, L. R. 1 Q. B. 54.

¹⁸ *Whicher v. Boston & Albany R. Co.*, 176 Mass. 275, 57 N. E. 601; *American Steamship Co. v. Bryan*, 83 Pa. St. 446.

is in accord with the authorities on the nature of the responsibility of the carrier of goods.¹⁹

A recent case adopts the test suggested, and points out a further requisite for imposing liability as insurer. *Hasbrouck v. New York Central & Hudson River R. Co.*, 202 N. Y. 363, 95 N. E. 808. A trainman of the defendant railway, who was assisting the plaintiff in changing cars, had her handgrip for about fifteen minutes in the front of the car. For a loss of goods from the handgrip, the railway was held responsible only for due care. Although the railway had possession, it was merely temporary, while rendering a service incidental to the carriage of a passenger. Thus, to be liable as insurer, the carrier must hold the goods as carrier.²⁰ Mere possession is not enough.²¹ That the possession is in the regular course of business should not produce a contrary result,²² for of such character is the carrier's possession after completion of the journey, when due care only is required.²³ The principal case should aid in producing a more desirable state of the authorities.

EXTENT OF VALID WAIVER OF CRIMINAL PROCEDURE. — Many incidents of the usual criminal trial procedure may be waived by the defendant without rendering his conviction invalid. Examples of this are his waiver of a formal arraignment,¹ specification of the charges against him,² personal presence at the trial,³ and the right to be confronted by witnesses.⁴ An accused may agree to be bound by the verdict in the case of a co-defendant.⁵ The incidents waived may be assured to him by constitutions,⁶ by statutes,⁷ or by the common law.⁸ But waiver of a jury trial is invalid;⁹ similarly, if the jury have not been sworn a conviction is invalid;¹⁰ and, by the weight of authority, a trial by a jury of less than twelve, though assented to by the accused, is illegal.¹¹ In

¹⁹ Undoubtedly, difficult questions of fact will arise as to what constitutes assumption of possession by the carrier. See *Nashville, Chattanooga & St. Louis Ry. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055.

²⁰ *Holmes v. North German Lloyd Steamship Co.*, 184 N. Y. 280, 77 N. E. 21.

²¹ The carrier may hold the goods as warehouseman. *Laffrey v. Grummond*, 74 Mich. 186. He may have possession momentarily while assisting a passenger to board a street car. *Sperry v. Consolidated Ry. Co.*, 79 Conn. 565, 65 Atl. 962.

²² *Holmes v. North German Lloyd Steamship Co.*, *supra*. *Contra*, *Butcher v. London & South Western Ry. Co.*, 16 C. B. 13. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 769.

²³ *Laffrey v. Grummond*, *supra*.

¹ *Hack v. State*, 141 Wis. 346, 124 N. W. 492. *Contra*, *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952.

² *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020.

³ *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947.

⁴ *Odell v. State*, 44 Tex. Cr. R. 307, 70 S. W. 964; *State v. Olds*, 106 Ia. 110, 76 N. W.

644.

⁵ Anonymous, 3 Salk. 317.

⁶ *Williams v. State*, 61 Wis. 281, 21 N. W. 56.

⁷ *Flynn v. State*, 97 Wis. 44, 72 N. W. 373.

⁸ *Wells v. State*, 16 S. W. 577 (Ark.).

⁹ *Harris v. People*, 128 Ill. 585, 21 N. E. 563.

¹⁰ *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159.

¹¹ *Dickinson v. United States*, 159 Fed. 801. *Contra*, *State v. Sackett*, 39 Minn. 69, 38 N. W. 773.